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No. 887

In the

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES M. CASIDA, *et al*,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, *AFL-CIO*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

International Union of Operating Engineers, (herein "International") and Local 351 of the International Union of Operating Engineers (herein "Local 351"), respectfully oppose the grant of certiorari herein.

Opinions Below

The opinion of the Texas Court of Civil Appeals (App. A of Petition) is reported at 376 S.W. 2d 814. The opinion of the Supreme Court of Texas (App. C of Petition) is reported at 383 S.W. 2d 571.

Jurisdiction

The jurisdictional requisites are set out in the petition.

QUESTION PRESENTED

May a state court impose a damage award in favor of union members against a labor union, certified under the federal law as exclusive bargaining agent, for conduct of union agents in "ordering" union members to engage in concerted strike and plant shutdown activity, and in making representations to the union members as to the means of carrying out a concerted strike activity?

Is the conduct of union agents in issuing such orders, and making such representations arguably subject to the federal labor laws, and thus preempted from state jurisdiction?

Statute Involved

The pertinent provisions of the Labor Management Relations Act of 1947, as amended [29 USCA §151ff.] are set out in the petition at pp. 15d and 16d.

STATEMENT

Claiming that they were coerced into strike and plant shutdown activity in which they had no desire to engage and which resulted in their discharge, plaintiffs sought damages in a Texas state court, from the union of which they were members.

Specifically they alleged that union agents "ordered" plaintiffs to shutdown their equipment and go on strike against Phillips Petroleum Corp., and faced with fine or expulsion from the union if they failed to follow union orders, plaintiffs shut the plants down and went on strike. They further alleged that union agents misrepresented the proper manner in which they should strike, thus causing plaintiffs to take certain concerted strike activity (plant shutdown) against their will, and that as a result of this concerted action the plaintiffs lost their jobs. See Transcript Vol. I, pp. 92ff., particularly at pp. 98, 101; 105-106.

Plaintiffs further complained that union agents failed to "inform them fairly and accurately" concerning collective bargaining, the plans with respect to shutdown, the proper manner to carry out a strike, the things they could rightfully do in carrying out a strike, their duties in carrying out a strike, and the employer's right to discharge an employee who in going on strike shuts down a plant contrary to instructions (Tr. Vol. I, p. 98).

Plaintiffs made no attempt to charge their unions before the NLRB; though, as we detail, *infra*, pp. 7-8, their allegations if true, would have held unions for violation of §§8(b)(1) and (2) of the Taft-Hartley law. 29 USCA §158(b)(1),(2).

The Texas jury found by a special issue verdict for plaintiffs that union agents had issued "orders" and engaged in misrepresentations as to plaintiffs' rights as a result of which plaintiffs involuntarily

engaged in concerted plant shutdown resulting in their discharge, and awarded over a million dollars in damages. See Tr. Vol. VII, pp. 11ff.

Thus the conduct which plaintiffs alleged, and the jury found as basis for liability was union restraint of employees in the exercise of their federal rights to refrain from union activity.

The Texas Court of Civil Appeals, after quoting from this Court's holding in *Borden*, 373 U.S. 690, that the concern in pre-emption cases is with "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered," 376 S.W. 2d at 818, quoting 10 L.Ed. 2d at 644, noted: "Thus in the present case the area of conduct complained of is the giving of the order to shut down the plants to the union members which resulted in their being discharged." 376 S.W. 2d at 818. The Texas Court of Civil Appeals concluded that the conduct arguably comes either within the protection afforded by §7, or the prohibition of §8(b)(1) of the federal Act and held that "the State Court is without jurisdiction." 376 S.W. 2d at 818.

The Supreme Court of Texas by *per curiam* opinion held "that the conduct in question is arguably subject to the jurisdiction of the National Labor Relations Board," and refused writ of error, 383 S.W. 2d 571.

ARGUMENT

1.

The Decisions Below are Clearly Correct

The conduct here at issue, the activities of union agents in communicating with union members with respect to the conduct of a strike aimed at enforcing bargaining demands against an employer engaged in interstate commerce, is clearly within the federal statute.

Such activities are either "protected" as necessary to the exercise of §7 rights to engage in concerted activities;[1] or "prohibited" as restraint of employees who prefer to exercise their §7 right not to engage in concerted activities.[2]

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[1] If, as union contended, the representations which the plaintiffs claim actionable were made in a context of reasonable anticipation that Phillips would agree to, and in cooperation with union would effect an orderly shutdown, such representations and advice that employees should not walk off and leave volatile equipment running—but should see that it was shut down properly, was proper advice based on decisions of NLRB. See *In re Reynolds-Manley Lumber Co.*, 104 NLRB 827. Cf. *In re Marshall Car Wheel & Foundry*, 107 NLRB 314, reversed on other grounds, 218 F. 2d 409 (C.A. 5, 1955).

[2] See *In re Warehouse & Distribution Workers Local*, 207, 118 NLRB 342 (1957), where it was held:

> "Section 7 of the [Federal] Act guarantees employees the right to refrain from assisting a labor organization in its strike or other concerted activities"

Or, as the Fifth Circuit stated in judicially approving an earlier ruling of NLRB in *NLRB v. Wood Workers etc, Union*, 243 F. 2d 745 (C.A. 5, 1947):

> "Section 7 [of the federal Act] provides that employees have the right to engage in concerted activity, and also have the right to refrain from any of these activities. The right to engage in these activities of course includes the right to strike and picket; the right to refrain from them includes the right to work in the face of a strike. *In re Sunset Line & Twine Co.*, 79 NLRB 1487, 1504."

Or, as the Second Circuit held in *NLRB v. Bell Aircraft Corporation*, 206 F. 2d 235, 237 (C.A. 2, 1953):

> "* * * Section 7 [of the federal Act] gave Finch the right to take part

(Footnote No. 2 continued on next page.)

To permit a state court to apply state law to such conduct not only deprives unions of the procedural safeguards written into the federal statute [e.g. the six months' limitation proviso of §10(b); and the protections of 8(c) which validates the utterance of opinion or other statement which does not contain threat of reprisal or promise of benefit]; it permits a state court jury to void §7 rights and encumber the entire collective bargaining process by the imposition (as here) of a damage judgment of over a million dollars against the federally certified bargaining agent. The very collective bargaining process which the federal Act seeks to protect is jeopardized—indeed obliterated—if the notions of a Texas jury as to the proprieties of communications between union agents and union members with respect to strike activities can override the federal statute.

Advice as to shut down which NLRB would hold to be proper union effort in lawful attempt to effect orderly shutdown in a manner consistent with the

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(Footnote No. 2 continued from preceding page.)

in the strike or not as he pleased, and if he chose not to take part in the strike, it was an unfair labor practice for either the employer or the union to interfere with the exercise of that right * * *."

The United States Court of Appeals for the Seventh Circuit described the purpose of Section 7 of L.M.R.A. in this manner:

"Section 7 protects an employee in his right to refrain from concerted activities and this includes, of course, the right to refuse to participate in or recognize a strike. Coercion or interference with that right, whether by the employer or by the union, is made an unfair labor practice by the terms of the Act." *Allen Bradley Co. v. N.L.R.B.*, 286 F. 2d 442, 445 (C.A. 7, 1961).

federal law,[3] has been held by the Texas trial court to be unlawful under Texas law.

Assuming that the "orders" and advice had not been protected, still this is conduct within the federal statute. For even viewed as plaintiffs asserted: "petitioners immobilized Phillips equipment *only under orders from their union officials.*"[4] And further that union rules "required petitioners to obey the orders of their union officials . . ."[5] Plaintiffs' trial pleading asserted:[6] "and faced with a fine and expulsion from the union, or both if they failed to do so, the plaintiffs shut the plant down." Or, as petitioners asserted in their brief below:[7] "Plaintiffs had no choice in the matter. They knew they had to follow those orders, and the same thing would probably happen to them that happened to about 20 others who violated a picket line: expelled with a $10,000 fine each." Again, plaintiffs "offered evidence to show that union membership standing and dues had been used by the union in

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[3] See cases cited in footnote 1, *supra*. Union's evidence showed that union, as in prior labor disputes at the Phillips refinery, anticipated that union and employer would agree to an "orderly shutdown" during the pendency of the strike. If prior practice had been followed, it would have been plaintiffs' responsibility to effect such orderly shutdown before going on strike. Walking off and leaving machinery running unattended in the highly dangerous refinery of volatile gases would have been cause for discharge. *In re Reynolds-Manley Lumber*, 104 NLRB 827.

Employer Phillips did not advise union agents of its intention to keep the refinery operating until *after* union agents had issued the "orders" and made the representations found actionable. S.F. Vol. VII, pp. 388-389; 403; 415; Vol. VIII, pp. 44-46.

[4] Application for Writ of Error, p. 18.

[5] Ibid., p. 18.

[6] Tr. Vol. I, p. 105,

[7] Petitioners' [there Appellees'] Brief to Court of Civil Appeals, p. 202.

the past to get men fired . . ." and accordingly: "these men [plaintiffs] knew that if they failed to follow those union orders, that in the past the union had taken those things to the company, questioned their qualifications, got them discharged, and that they would do it again if they didn't follow the union's orders with reference to shutting that plant down."[8]

Quite clearly in pleading, evidence and briefs below petitioners have asserted that union "orders" or other union restraint or coercion forced petitioners' concerted action, for which they were discharged. Indeed, the basis of this action is that concerted activity in strike and shutdown was the result of restraint and coercion by union agents who misled petitioners into such activity despite the fact that they did not desire to strike, and took the action only at the instance of union "bosses" who coerced them into concerted activity. Any other view flies in the teeth of petitioners' own pleading, evidence, and the jury's finding that petitioners' activities were not voluntary.[9]

So viewed, the activity of which petitioners complain violated 8(b) (1) (A)—for it constituted union restraint or coercion of employees in the exercise of their section 7 rights *not* to engage in concerted activity. See cases in footnote 2, *supra*.

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[8]Petitioners' [there Appellees'] Brief to Court of Civil Appeals, pp. 200-201.

[9]See Jury findings 50(b); Tr. Vol. VII, pp. 85-86; Issues 71-98, Tr. Vol. VII, pp. 109-134.

Viewed either as "protected" or "prohibited" by the federal Act—the result is the same—the conduct is to be judged by federal tribunals under the federal Act, and the state court has no jurisdiction.

2.

Petitioners' "New" Arguments

Ingenious counsel now seek to overturn the clearly correct decisions in the Texas appellate courts by assertion that NLRB has examined the conduct here at issue, refused to act with respect to it, and thus left the state courts free to control it, Petition, p. 9ff.

There are many difficulties with petitioners' new argument. First, it is made for the first time in this Court. Second, it depends upon matters outside the record. Third, no complaint was ever made to NLRB with respect to the union conduct here at issue; accordingly, NLRB did not, and could not have passed upon it.

A.

In the courts below petitioners were arguing that they did not bring charges against the defendant unions under the National Labor Relations Act for, they asserted, "Any such charge would be blocked by the proviso just quoted" [the proviso to §8(b)(1)(A)].[10] Again they asserted below: "There is absolutely no way in which they (petitioners) may

[10]Petitioners' (there Appellees) Brief to Court of Civil Appeals, p. 28, last 2 lines.

proceed against defendants under the National Labor Relations Act."[11] Again they specifically asserted that it was useless for them to seek NLRB relief against these defendants, for, they asserted "They [petitioners] would find resort to the National Labor Relations Board a futile gesture."[12]

Yet petitioners *now* assert that "the requirements of the primary jurisdiction rule have been met, that is [the case is presented to the courts] *after* the NLRB has exercised its jurisdiction and determined that the activity involved is *not* "subject to the protection of §7 or the prohibition of §8 of the National Labor Relations Act," Petition, p. 9.

We find it difficult to reconcile assertions that the matters here in issue were not presented to NLRB, because to do so would be a "futile gesture," with the present assertion that "NLRB has exercised its jurisdiction." Obviously, it has not.

B.

Petitioners append as Appendices E and F to the petition letters relating to NLRB Case 16-CA-1115. These were not admitted in evidence—and have never been considered by the courts below. They were proffered to the trial court in the absence of the jury, solely to perfect a bill of exception for

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[11] Ibid., p. 32.

[12] Ibid., p. 35. This position was reasserted in Petitioners' Application for Writ of Error to the Supreme Court of Texas, at pp. 19-20: where petitioners asserted:

"If petitioners had filed their complaints with the NLRB, as the Court of Civil Appeals would require, the NLRB's answer would have been 'no jurisdiction'."

the *"limited purpose and offered solely and exclusively for the purpose of laying a predicate for the introduction of [another exhibit]," which was also excluded.*[13] Although the trial court stated that he would rule on the admissibility of these letters "as they are at some future time proffered,"[14] they were never thereafter offered in evidence. Since they were outside the record they were, of course, not considered by any of the courts below. Accordingly, they should not be considered here.

C.

Even were this court to go outside the record, it would still be apparent that petitioners made no attempt to charge unions under the NLRA before the Board. Assuming, *arguendo,* a showing that petitioners charged employer, Phillips, with violation of §8(a)(1) and (3) in interfering with Section 7 rights and discrimination in regard to hire or tenure of employment to discourage membership in the union; the NLRB Regional Director's refusal to issue complaint against employer, Phillips, be-

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[13] See S.F. Vol. VIII, p. 84, where petitioners' counsel stated:

"MR. SMITH [counsel for plaintiffs-petitioner]: Your Honor, I understand that and we are not in any sense of the word attempting to get behind the log with the Court. This other material that has been offered here this morning in the absence of the jury has been limited and offered solely and exclusively for the purpose of laying a predicate for the introduction of that portion of the Plaintiffs' Exhibit No. 67, which is, of course, the document that the Court refers to, and that is all.

COURT: Well, I want the record to definitely reflect that the Court has not previously, nor at this time is the Court overruling any of the other proffered exhibits here, except the Request to Review. And that the Court reserves the right to rule on such exhibits as they are at some future time proffered.

MR. SMITH: All right, sir. I believe that that completes the bill, Judge."

[14] See Footnote 13, *supra.*

cause of "insufficient evidence of violation" cannot be stretched into action by which "the Board has found that petitioners' action in shutting down the plants was not 'concerted' activity protected by §7" as alleged in the Petition at p. 15.

Indeed, the Board made no finding. At most, the Board's general counsel sustained a refusal to issue a complaint against employer, Phillips, because of "insufficient evidence of violation." The area of insufficiency is not even suggested. There is no suggestion that Board found that the activity was not protected by §7 of the federal Act, as petitioners now categorically assert. Petition, p. 16.

Assuming, *arguendo,* that the Board had found that petitioners' activity was not "protected," [i.e. their plant shutdown activity in support of union concerted strike activity], that would have no bearing upon the question whether petitioners' "right to refrain from any or all of such activities," also guaranteed by §7 was infringed by unions. A finding that engaging in particular concerted activity for mutual aid or protection is not "protected" cannot be equated with a finding that union coercion to keep employees from such activity is not violative of the federal Act. Section 7 guarantees both rights "to engage in" and "to refrain from." Determination of the legal status of the former does not determine the legal status of union restraint or coercion to cause employees to forego the latter.

So it is clear that NLRB has never been presented with the opportunity of deciding—nor has it decided—that the union activity here at issue was not protected. The petition herein based principally on the premise that "NLRB necessarily determined that the activity under consideration was neither "protected" nor "prohibited" (Petition, p. 13) and hence "the primary jurisdiction rule has been satisfied making the pre-emption doctrine inapplicable" (Petition, p. 12), thus is shown to be without basis.

In any event, Petitioners' contention is foreclosed by this Court's opinion in *San Diego Bldg. Trades v. Garmon,* 359 U.S. 236, at 244:

> "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7, or prohibited by §8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. * * * It follows that *the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act.* In

the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. (Emphasis added.)

3.

Even if neither "protected" nor "prohibited," the activity remains preempted.

As demonstrated, the conduct here at issue was either protected or prohibited by the Federal Act. Assuming *arguendo* that it was neither, however, it is still removed from state jurisdiction since it lies squarely within the "area of conduct" as to which the Congress legislated.

Such is the precise holding of *Teamsters Local 20 v. Morton,* 377 U.S. 252, 12 L.Ed. 2d 280, 285, where respondents argued, as do petitioners here, that the union's conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the Federal Act. In reply this Court declared:

> "But even though it may be assumed that at least some of the . . . activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting . . . [the federal statute], 'Congress occupied this field and closed it to state regulation'." 12 L. Ed. 2d at 285.

In striking down damages awarded under state law, the Court held:

> "In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law'." 12 L.Ed. 2d at 287.

See also *Plumbers Local 100 v. Borden*, 373 U.S. 690, 698, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 ("[o]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered"). (Emphasis in the original in *Borden*.)

Regulation of strikes and picketing, and preservation of the right to strike without "restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood prior to 1947, unless 'specifically provided for' in the Act itself," are central themes of the Federal labor law. *NLRB v. Teamsters Local 639*, 362 U.S. 274, 281. But the right to strike is not exercised in a vacuum. It is exercised by this particular union official or representative giving this particular order, or instruction, or request, or piece of advice, to this particular group of employees, and by that group of employees proceeding to shut down this particular plant in this particular manner. Every step in that sequence must be governed exclusively by the Federal Act, either as protected, prohibited or (as in *Morton*) permitted conduct, or else the whole principle of Federal pre-

emption in this most critical area of strike activity becomes a meaningless abstraction.

As the petitioners themselves acknowledge in another context in a brief to the Supreme Court of Texas: "It is elementary that the 'strike' area is the most sensitive area in management-labor relations. Nowhere is the Supreme Court of the United States more alert to protect NLRB jurisdiction than in a case involving state interference with a strike."[15] We agree.

State intrusion into this area of conduct can wreck the Federal system of collective bargaining. The Texas appellate courts since *Ex parte George,* 371 U.S. 72, and *Borden,* 373 U.S. 690, now understand this, and have properly held that Texas trial courts may not impose million dollar damage judgments against unions for conduct which is within the sweep of the Federal statute.

CONCLUSION

WHEREFORE, the petition for certiorari should be denied.

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[15] Petitioners' "Argument in Support of Motion for Rehearing of Application for Writ of Error," at p. 11.

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March 5, 1965

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of March, 1965, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served upon counsel for Petitioners by depositing same in the United States mail with sufficient air mail postage affixed, addressed to:

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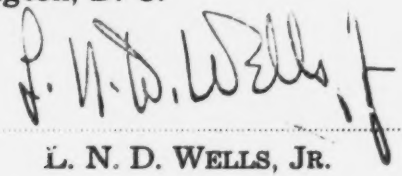

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